IN THE

Supreme Court of the United States

OCTOBER TERM 1975

Supreme Court, U. S.
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No. 75-5394

JERRY LANE JUREK,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

No. 75-5844

STANISLAUS ROBERTS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

No. 75-5491

JAMES TYRONE WOODSON AND
LUBY WAXTON,

Petitioners,

(continued)

v.

STATE OF NORTH CAROLINA,

Respondent.

CONSOLIDATED REPLY BRIEF FOR PETITIONERS

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(1) For the most part, the briefs of the respondents and of the *amici* supporting respondents in these cases[1] repeat the arguments made in the responding briefs in *Fowler v. North Carolina*, No. 73-7031. Those arguments are answered in the Reply Brief for Petitioner in *Fowler*, reprinted as Appendix 2 to the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at pp. 2-1 to 2-85, which we hope the Court will consent to consider in the present cases. At this eleventh hour, we add only four short points.

[1]The following abbreviations are used hereafter to designate these briefs:

Brief for the Respondent in *Jurek v. Texas*, No. 75-5394 is designated "Tex. Br."
Brief for the Respondent in *Woodson & Waxton v. North Carolina*, No. 75-5491 is designated "N.C. Br."
Brief for Respondent in *Roberts v. Louisiana*, No. 75-5844 is designated "La. Br."
Brief for *Amicus Curiae* [State of California] in Support of Respondents in Nos. 74-6257, 75-5394, 75-5491, 75-5706 and 75-5844 is designated "Cal. Br."
Brief for the United States as *Amicus Curiae* in Nos. 74-6257, 75-5394, 75-5491, 75-5706 and 75-5844 is designated as "U.S. Br."

We shall also have occasion to refer to:

Brief for Respondent in *Gregg v. Georgia*, No. 74-6257 as "Ga. Br."
Brief of Respondent in *Proffitt v. Florida*, No. 75-5706 as "Fla. Br."

(2) After *Furman* we had not anticipated the recurrence of the arguments (a) that the Fifth Amendment's mention of capital crimes demonstrates that the Framers of the Eighth Amendment did not mean to invalidate the death penalty, and (b) that the prevalence of capital penalties (and their enactment by Congress) in 1791 demonstrates the same thing. *See* Tex. Br. 6; N.C. Br. 18-20, 28; Cal. Br. 18-19; U.S. Br. 16-17; Fla. Br. 9-11. These arguments miss the point, of course. It is true that the Fifth Amendment contemplates that capital penalties *may* exist, and guarantees certain procedural safeguards in capital prosecutions *if* capital penalties do exist; but the Fifth Amendment does not thereby state or assume that nothing else in the Bill of Rights will ever come to forbid capital penalties. Petitioners' Eighth Amendment contention certainly is not that the Framers meant specifically to outlaw capital punishment in 1791, but rather that they meant to (and did) embody in the Constitution a broadly principled proscription against cruel and unusual punishments which is evolutionary[2] and has now come to condemn the death penalty – just as it has also come to condemn dismemberment notwithstanding the Fifth Amendment's assumption that defendants may be placed once (although not twice) "in jeopardy of life *or limb*." It is unclear whether *amici* mean to argue that,

[2]The evolutionary character of the Eighth Amendment was established in *Weems v. United States*, 217 U.S. 349, 373-378 (1910); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Chief Justice Warren); and *Robinson v. California*, 370 U.S. 660, 666 (1962). It was accepted in the dissenting opinions as well as the concurring opinions in *Furman v. Georgia*, 408 U.S. 238 (1972). *See* Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at p. 109 n.165. And if the Eighth Amendment were *not* evolutionary, it would be a constitutional anomaly. *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954). *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885).

because the First and Second Congresses punished counterfeiting and debasing federal currency by death (Cal. Br. 19; U.S. Br. 17), these crimes could be capitally punished today consistently with the Eighth Amendment. In any event, the argument from the prevalence of capital penalties in 1791 proves too much, since one of the commonest extant punishments in 1791 was whipping (*but see Jackson v. Bishop*, 404 F.2d 571 (CA8 1968)); another was banishment (*but see Trop v. Dulles*, 356 U.S. 86 (1958)); the penalty of wearing a metal halter for life was provided (1 Acts and Laws of the State of Connecticut in America 8 (Babcock, Hartford 1786)) (*but see Weems v. United States*, 217 U.S. 349 (1910)), not to speak of branding on the forehead or the body; and other common punishments in 1791 included boring through the tongue and the cropping, nailing, and severing of ears. *See* authorities collected in Appendix C to Brief for Petitioner, *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], at pp. 1c-28c.

(3) Evidence of the deterrent effect of the death penalty is sought in the observation that "the homicide rate in the United States . . . has risen at an alarming *rate* since the imposition of the *judicial* moratorium upon the execution of death sentences." Fla. Br. 31, original emphasis. The responding briefs repeat this point in varying forms, referring to varying periods between 1960 and 1974. *See* N.C. Br. 35-37; Cal. Br. 33; Ga. Br. 74-75; Fla. Br. 31 n.1. Nowhere do they note that the homicide[3] rate has risen far less than the

[3]Homicide here refers to the category of crimes classified as "murder and non-negligent manslaughter" by the Uniform Crime Reports of the Federal Bureau of Investigation. Neither murder nor capital murder offenses are separately analyzed in the U.C.R.

general rate of crime throughout these periods. For the period 1960-1971, during the so-called "*judicial* moratorium" preceding *Furman*, the percentage increase in the number of all Index crimes[4] was 196.9%. Percentage increases for specific Index crimes ranged from highs of 269.6% for larceny ($50 and over) and 259.5% for robbery to a *low* of 95.2% for homicide. The over-all percentage increase for the *rate* of Index crimes per 100,000 inhabitants was 158.1%, whereas the percentage increase in the murder rate was less than half of that for all Index crimes: nanely, 70.0%. This was also less than half of the percentage for all violent crimes,[5] 146.2%.[6] For the period from 1960 through the end of 1974, the percentage increase in the number of all Index crimes was 203.0%, ranging from highs of

[4]"Index crimes" are the seven crimes (also known in the jargon as "Part I" offenses) for which offense information (in addition to arrest information) is reported yearly by the U.C.R. *See* UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES — 1974 6 (G.P.O. 1975) [hereafter cited as U.C.R. 1974]. The seven crimes are (1) murder and non-negligent manslaughter, (2) forcible rape, assault to rape, and attempted rape, (3) robbery, (4) aggravated assault, (5) burglary, breaking and entering, and attempted forcible entry, (6) larceny-theft [which was larceny over $50 prior to 1973 but was expanded in that year, with retrospective adjustment of the relevant prior-year figures], and (7) consummated or attempted motor vehicle theft. *See id.* at 5-7. "The Crime Index offenses were selected because, as a group, they represent the most common local crime problem." *Id.* at 10.

[5]*I.e.*, the first four of the seven crimes described in note *supra*. *See* U.C.R. 1974 at 10.

[6]The figures set forth in the preceding four sentences of text are found in Table 2, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES — 1971 61 (G.P.O. 1972).

310.2% for robbery and 233.2% for burglary to a *low* of 127.4% for homicide. The percentage increase in the rate of homicide per 100,000 inhabitants (90.2%) was again less than half of that for all violent crimes (186.8%): the rate of all Index crimes was up 157.0% compared to the 90.2% for homicide.[7] The only post-1974 figures available, so far as we know, consist of a preliminary annual release reporting percentage changes in the number of crimes from 1974 to 1975. Total Index crime was up 9%, with highs of 12% for larceny-theft and 7% for burglary. Homicide declined by 1% – the only Index crime to show a decrease.[8] None of this is said to suggest that homicide and its rise in recent years are not exceedingly serious problems. They are.[9] But it is plainly irresponsible to suggest that they are attributable to any "*judicial* moratorium" on capital punishment when, in fact, the rate of increase of offenses that were not punished by death before *Furman* or the "moratorium" has steadily outstripped the homicide-rate increase by a factor of two.[10]

[7]The figures in the preceding two sentences are found in Table 2, U.C.R. 1974 at 55.

[8]UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1975 PRELIMINARY ANNUAL RELEASE) at Table 1 (March 25, 1976).

[9]And society doutless must have ample means to deal with them as it does, without the death penalty. Life imprisonment and its practic.! equivalents, as one alternative, is no stranger to the American penological system. *See* the 408 statutes of 52 jurisdictions collected in Appendix A *infra*, at pp. 1a-23d.

[10]*See* Palo Alto Times, March 5, 1976, p. 30, col. 1:

"NEW ORLEANS (AP) The lawyers for five Southern states say the 1972 decision by the U.S. Supreme Court outlawing the death penalty has resulted in an increase in homicides.

"Representatives of Texas, Georgia, North Carolina, Florida and Louisiana met in a private session Thursday to

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(4) Petitioners are charged with foisting "an extremely complex, mathematical debate . . . [upon] the Court" and attempting to foist it "into the Constitution." Tex. Br. 18. This sally misconceives the nature and the purpose of our criticisms[11] of the Isaac Ehrlich study which the Government originally lodged with the Court shortly prior to the oral argument in *Fowler v. North Carolina* and which is now found cited at Tex. Br. 24 n.20; N.C. Br. 36; Cal. Br. 31-32; U.S. Br. 38 and Appendix B. As the isolated splendor of the Ehrlich citation in the deterrence sections of these briefs strikingly demonstrates, Professor Ehrlich's paper was the only purportedly empirical study to find any

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coordinate legal strategy for their challenge to the high court's decision against capital punishment.

" 'There has been a tremendous escalation of homicides in our state since the last execution in Florida, in 1964,' the state's attorney general, Robert L. Shevin, told reporters afterward.

" 'There's been a tremendous upswing in murder during robberies,' added Texas Atty. Gen. John L. Hill. 'There's nothing to deter them from taking lives.'

" 'If you want to talk about villains, talk about the Supreme Court,' said Atty. Gen. Rufus Edmisten in reporting that serious crime in North Carolina was up 31 per cent last year."

[11]*See* footnote 31 and Appendices C-E of the Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, reprinted in Appendix 2 to the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at pp. 2-22 n.31, 2-43 to 2-85.

evidence of deterrent effects of capital punishment[12] notwithstanding prior studies during forty years had made this area the single most intensively researched

[12]The Government's "See also" citation to Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 60 (1952), is disturbing. A quotation at U.S. Br. 39 implies that Schuessler *concluded* that there is " 'a slight tendency for the homicide rate to diminish as the probability of execution increases,' " *ibid.* However, the next two sentences in Schuessler's original text continue: "Next, as a check on the consistency of this trend, the ratio of the average execution rate to the average homicide rate was computed for four groupings of states according to the size of the homicide rate, as shown in column 3 of Table 5. This analysis shows that the homicide rate does not consistently fall as the risk of execution increases." 284 ANNALS at 60. After making an additional point, Schuessler proceeds, on the same page: "This evidence, like that just preceding, fails to substantiate the belief that the deterrent influence of the death penalty is enhanced by its frequent use, as changes in the homicide rate do not correspond in a systematic way to variations in the probability of its being used." (*Compare* Ehrlich; and *compare* U.S. Br. 39: "All of the earlier studies that have found no measurable deterrent effect from the death penalty . . . have relied not upon the actual *use* of the death penalty, but upon its statutory authorization, as the independent variable against which the murder rate was compared" (original emphasis).) And Schuessler concludes (284 ANNALS at 62):

> "To summarize: statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value. The belief in the death penalty as a deterrent is repudiated by statistical studies, since they consistently demonstrate that differences in homicide rates are in no way correlated with differences in the use of the death penalty. Case studies consistently reveal that the murderer seldom considers the possible consequences of his action, and, if he does, he evidently is not deterred by the death penalty. The fact that men continue to argue in favor of the death penalty on deterrence grounds may only demonstrate man's ability to confuse tradition with proof, and his related ability to justify his established way of behaving."

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topic in the empirical literature of criminal deterrence.[13] The Government claimed that Professor Ehrlich had remedied a defect in "all of the [earlier] studies,"[14] which, it was asserted (and is still asserted[15]

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The Government twice suggests that Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975), "confirm[s] Ehrlich's original findings," U.S. Br. 11a; *see id.* at 38. In fact, the Bowers and Pierce study found Professor Ehrlich's research riddled with errors, and it concluded that "the hypothesis that the death penalty deters murders finds no support." Bowers & Pierce, *supra*, 85 YALE L.J. at 206. The Government's mischaracterization is puzzling, since the Bowers and Pierce study begins, "we conclude that he [Professor Ehrlich] has failed to provide any reliable evidence that the death penalty deters murder. His data are inadequate for the purposes of his analysis and he misapplies the highly sophisticated statistical techniques he employs." *Id.* at 187. Examining Professor Ehrlich's techniques, Bowers and Pierce find "that his evidence of deterrence emerges only under restrictive assumptions about the form of relationships among the variables and only under a narrow selection of the time period for analysis. The limitations required to obtain these results are not justified, since Ehrlich's regression model fits the data better without them. Thus, even if Ehrlich's data were free of errors, the analysis, when properly conducted, would not show that the death penalty has a deterrent effect." *Id.* at 192-193. Only after making these "unjustified" assumptions, for the purpose of illustration, did Bowers and Pierce obtain "results [that] are similar to Ehrlich's." *Id.* at 196 (footnote omitted).

After the Ehrlich paper was produced, a second unpublished econometric manuscript appeared (and was lodged with the Court by the Solicitor General) which *does* purport – alone with Ehrlich – to find some deterrent effects of capital punishment. This is the Yunker manuscript mentioned at U.S. Br. 38-39. *See* note 23 *infra*.

[13]*See* Appendix E to the Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at pp. 1e-6e.

[14]Brief for the United States as *Amicus Curiae* in *Fowler v. North Carolina*, No. 73-7031, at p. 37.

[15]U.S. Br. 40; *see also* Cal. Br. 32.

incorrectly)[16] "failed to hold constant factors other than the death penalty that might influence the rate of murders."[17] Because we were concerned – particularly in view of the lateness of the hour prior to the *Fowler* arguments – that the arcane and facially abstruse quality of the Ehrlich paper might lend it a credence which it would not merit if it were more readable,[18] we undertook to criticize it and to demonstrate, *inter alia*, that it was Professor Ehrlich, rather than earlier investigators, who had failed fatally to "hold constant" factors that can influence murder rates.[19] In making

[16]*See* note 19 *infra*.

[17]Brief for the United States as *Amicus Curiae* in *Fowler v. North Carolina*, No. 73-7031, at p. 37.

[18]*See* Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, reprinted as Appendix 2 to the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at p. 2-22 n.31.

[19]There are numerous ways in which an empirical investigator can "control" the effect of variables other than the independent and dependent variables which he is studying. One is the "matching" method used by Professor Sellin and other empiricists in their studies of the deterrent efficacy of capital punishment: namely, to observe and analyze the relationship of the independent variable (capital punishment) and the dependent variable (homicide rate) in universes (adjoining jurisdictions; adjacent periods of time immediately preceding and following abolition or reinstitution of the death penalty) which are as similarly matched as possible. This method lacks the ostensible precision of identifying, measuring, and manipulating all of the "control" variables, but it has the great virtue of permitting the investigator to maintain at least a general control over all of the operative variables *whether or not all of these variables are known, quantifiable, or susceptible of measurement*. Another "control" method, attempted by Professor Ehrlich, is to study one universe only, and within that universe to identify, measure, and specify the relationship of all of the relevant variables. Unlike the first method, the second will work only where all of the relevant variables are known (as is not the case with the factors that influence murder rate), and where they are all

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this point and noting other defects of the Ehrlich paper,[20] we were not seeking merely to show that

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properly measured and included in a properly specified relationship. Professor Ehrlich fails completely on the latter account: of the eight variables mentioned in footnote 23 *infra*, for example, he undertakes to control only one.

Two points emerge. (1) It is quite incorrect to criticize Professor Sellin and the scholars who have made numerous "matching" (or "cross-sectional") studies of the deterrent efficacy of capital punishment for a supposed failure to "control" other variables. (*See* note 15,17 *supra*.) the "matching" approach itself is a control method, and it may be the only useful control method where variables are unknown or not susceptible of precise measurement. *See* Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170, 177-183 (1975). (2) Professor Ehrlich's method is in fact *more* sensitive to the omission of relevant variables than the "matching" method because Professor Ehrlich's method depends entirely upon the investigator's identification and inclusion of the relevant variables in his specified mathematical relationship. *See* Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359, 363-365 (1976). Professor Ehrlich's manifest failure to include relevant variables therefore makes his study worthless. *See* Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, reprinted in Appendix 2 to the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at pp. 2-54 to 2-57.

[20]*See* Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, reprinted in Appendix 2 to the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at pp. 2-22 n.31, 2-43 to 2-60, 2-63 to 2-85. *See* Bowers & Pierce, *supra* note 12; Baldus & Cole, *supra* note 19; Peck, *supra* note 19.

One of the criticisms made of the Ehrlich study has been that he has *aggregated* data on executions and homicides for all States. *See, e.g.*, Peck, *supra*, note 19, at 362-363, 367. This assumes that there is a "national market for murder," and that the effect of an execution is the same throughout the United States, in States that authorize and do not authorize the death penalty, regardless of where the execution occurs. A more

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Professor Ehrlich was unpersuasive, but that his study was both so ill-designed and so irrelevant as to be unworthy of consideration.[21] And that is in fact the

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appropriate approach is to isolate the effect of executions on the homicide rate of particular jurisdictions. While the Government adverts to a study by Columbia University Professor Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61 (1975), *see* U.S. Br. 42, the Government neglects to mention that the Passell study is exactly the kind of "'disaggregated' data [research] . . . for individual states, for particular spans of years different from those used by Ehrlich . . . [which the Government asserts] are now under way" to test Ehrlich's results with aggregated data, *id.* at 15a. The findings of the Passell study have in fact been published. Using a "multivariate regression analysis on cross-section state data for the United States for the census years 1950 and 1960," Passell, *supra*, 28 STAN. L.REV. at 64, Passell sought to test the hypothesis that the actual use of capital punishment deterred murder. His conclusion, discussed at length in his study, was that there was "no reasonable way of interpreting the cross-section data that would lend support to the deterrence hypothesis." *Id.* at 80.

[21] "The single scientific study which gives any indication that the death penalty may have a deterrent effect is Ehrlich . . . . However, serious flaws have been revealed both in Ehrlich's approach and in his results. We are not persuaded that this study adds much, if anything, to our analysis." *Commonwealth v. O'Neal*, ____ Mass. ____, 339 N.E.2d 676, 684 (1975) (opinion of Chief Justice Tauro).

case,[22] however unhappy we may be to have to put it into plain language.[23]

[22] The impression created by Appendix B to the Government's *amicus* brief (U.S. Br. 9a-16a) is that an inconclusive debate is now being waged about the Ehrlich paper. We urge the Court to read the full texts of the articles summarized by the Government, which can be more aptly characterized as an inauspicious publication by Professor Ehrlich, a completely damning response by critics less inspired to respond by the intrinsic significance of Professor Ehrlich's work than by the fear that work of this sort might be given consideration by the courts on an issue of human life or death (*see* the authorities collected in note 20 *supra*), a predictable self-defense by Professor Ehrlich containing much confession-and-avoidance, and a measured summing-up by Professor Peck, who sees some potential for *other* studies (such as Passell's, *see* note 19 *supra*) in Professor Ehrlich's econometric approach, but dismisses the Ehrlich study itself as follows:

> "Without denying the usefulness of his approach, which appears to me potentially fruitful, I believe that his particular finding of a deterrent effect rests on as yet inadequately tested assumptions and on an incompletely validated model."

Peck, *supra* note 19, at 367.

[23] With equal unhappiness, we must say the same thing about the second unpulished document that the Government has presented to the Court. The criticism of Professor Ehrlich's manuscript which appears as Appendix C to the Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, and is now reprinted in Appendix 2 to the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at pp. 2-43 to 2-60, was prepared by petitioner Fowler's counsel after the Government lodged Professor Ehrlich's unpublished manuscript with the Court six weeks before the *Fowler* oral argument. Counsel have not undertaken a similar analysis of James Yunker's unpublished paper, lodged with the Court by the Government and served upon us five days before the oral argument in the present cases. But we have examined it; and the Yunker paper self-evidently merits precisely as much discussion at it is given in a footnote in Peck, *supra* note 19, at 367 n.27:

(continued)

(5) The Government seeks to reassure the Court[24] that a panoply of entirely arbitrary and irregular procedures for the administration of the death

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"Yunker's conclusion that 'the real [deterrent] effect is at least five times the size of the effect estimated by Professor Ehrlich' is unmitigated conjecture. . . . The paper also appears to contain technical errors."

The predicate of Professor Yunker's thesis is that "[t]he only thing which changed dramatically in the period just prior to the recent blossoming of the homicide rate was the social propensity to inflict capital punishment, which dropped away to nothing in a very short period . . . . [A]s far as the general socio-economic factors bearing on the homicide rate are concerned, such as urbanization, non-white ratio, youth ratio, etc. – and expecting the unemployment rate . . . – these have not changed significantly in the recent past. U.S. society simply has not undergone any drastic transitions in these variables since the middle fifties. By eliminating them from a statistical formulation, it is not likely that we will miss numerically important causative agents of the recent drastic rise of the homicide rate . . . . " Yunker, "The Deterrent Effect of Capital Punishment: A Comment" (Typescript lodged with the Court by the Solicitor General, March 25, 1976), at pp. 9, 11-12. *See also id.* at p. 17. This basic proposition is incredible. Among the factors universally cited by criminologists and law enforcement officials alike as potentially contributing to the upswing of the homicide rate in recent years are (1) "the widely noted proliferation of handguns that has taken place during the last 10 years," (2) "[n]arcotics addiction," (3) "a climate of violence abetted by television," and (4) "the post World War II baby boom" bringing "a great number of youths" to the most murder-prone age "during the late 1960's and early 1970's. E.g., Stevens, "Murder Wave of the 70's Appears to Ebb in Cities," N. Y. Times, January 11, 1976, p. 1, col. 2, p. 30, cols. 4-6. Other factors include (5) increasing population density; (6) racial tension and its legacy; (7) alienation in cultural subgroups; and (8) decreasing length of prison sentences. Any purported analysis of homicide rates which *a priori* dismisses such factors simply cannot be taken seriously.

[24]The Government's *amicus* brief speaks – and properly so – with all of the prestige of the United States. Nevertheless, so far

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penalty[25] does, in fact, produce regular and nonarbitrary results.[26] To this end, it quotes KALVEN & ZEISEL, THE AMERICAN JURY 437 (1966), for the

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as it contains factual assertions and predictions, we must note with the utmost respect that it does not evidence any significant experience with the processing of capital cases. The Government does not purport to "specifically address . . . any particular alternative approach" to the trial of capital cases (U.S. Br. 5); and such assertions as the proposition that capital juries "may not be death-qualified, *Witherspoon v. Illinois*, 391 U.S. 510" (U.S. Br. 55) indicate considerable unfamiliarity with what is actually happening at capital trials throughout the country.

[25]"We agree with petitioners that the process by which the criminal justice system operates, involving charging discretion, plea bargaining, the jury's ability to acquit, and executive clemency, involves discretion that will be with us so long as we have a system of criminal *justice.*" U.S. Br. 12 (original emphasis). "[A]t every stage it is possible for one person or a small group of people to prevent . . . [the] infliction [of the death penalty]." *Id.* at 81. The Government, indeed, takes comfort in the proposition that "the jury, with its prerogative to 'nullify' laws and penalties repellent to its sensibilities, is an effective ultimate check against legislative aberrations." *Id.* at 30.

[26]The Government's standard of what is arbitrary, however, is notably lax. In its discussion of "sociopathic individuals who, although not insane . . . , are quite apt to commit additional murders even if sentenced to life imprisonment without possibility of parole" (U.S. Br. 50) and persons who have "sufficiently indicated a proclivity repeatedly to commit heinous offenses so that execution would be justified solely by the need to incapacitate . . . [them]" (*ibid.*), the Government opines that "Petitioner Jurek also may be within this category" (*ibid.*). Presumably, the Government of the United States of America has made this determination on the same basis as petitioner Jurek's jury – because it is the only basis in the record – namely, the instant crime and the one-line hearsay opinions of four local citizens that Mr. Jurek's general reputation in the community as a peaceable and law-abiding citizen is bad. *See* Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at pp. 20-21.

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proposition that "a clear pattern [of "almost gratuitous violence"] emerges" in "cases in which the jury and judge agree that the defendant should pay for his crime

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The Government also deals inaccurately with much of the literature concerning racial discrimination and capital punishment collected in Appendix A to U.S. Br. at 1a-8a:

(1) Its summary of Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957), at U.S. Br. 2a-3a, suggests that the assertion that "[t]his is not a 'study' at all" (U.S. Br. 2a) arises from the Government's having read the text of the Johnson article while skipping over the Tables. Johnson's Table 7 shows a substantially higher execution rate for blacks than whites *among* capital offenders committed to death row; and it was this aspect of the article that led to its inclusion in footnote 226 of the Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at 136.

(2) The Government's discussion of Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949), implies that his "data cut two ways" (U.S. Br. 2a) in some inconclusive sense. They do not. The "two ways" are (a) that blacks who kill whites are prosecuted, convicted, and sentenced far more severely than defendants in cases with any other racial combination of defendants and victims; whereas (b) in cases on intra-racial killings, white-white killers are treated more severely than black-black killers. There is nothing inconclusive about this classic demonstration of the "indulgent-nonindulgent" racial sentencing pattern noted in footnote 146 of the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at p. 82. The Government's conclusion that the "net effect is unclear, and Garfinkel declined to engage in 'sheer speculation' about it" (U.S. Br. 2a) appears, once again, to be the product of over-hasty reading. Garfinkel used the quoted phrase "sheer speculation" in 27 SOCIAL FORCES 381 to refer *only* to his unwillingness to analyze one class of cases: cases of white killers with black victims. Interpretation of *this class* of cases would have been "sheer speculation" because of "[t]he small number of such cases remaining" at the charging and conviction stages; and Garfinkel declined to speculate concerning that class. *Ibid.* He neither declined to analyze black-white, white-white and black-black cases nor described his analysis of those three classes of cases as speculative.

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with his life . . . ." U.S. Br. 96. The Government does not quote the following page:

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(3) Nowhere in the Bedau article discussed at U.S. Br. 3a-4a is there a finding that the differential commutation rates for nonwhites and whites (8.1% for nonwhites; 17.7% for whites) "becomes statistically insignificant if past criminal record of the offender is accounted for" (U.S. Br. 4a). Nowhere in the Bedau article is data presented from which such a conclusion could be drawn. Race and past criminal record are never correlated with each other or combined in any Table or presentation of Bedau's data. *See* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964), *passim*. We simply cannot conceive any basis on which the Government could assert that the Bedau study says anything about the relationship between race and past criminal record. The passage quoted by the Government at U.S. Br. 4a to the effect that " 'the evident differential treatment accorded non-whites under sentence of death' " does not imply " 'racial prejudice in the courts or commutation authority' " (see 19 RUTGERS L. REV. at 53) has nothing to do with this subject, and is quoted by the Government out of context. What Bedau is saying here is perfectly plain from the sentence in his text following the one quoted by the Government. "This [differential] treatment [of non-whites] can be accounted for as well by low socio-economic status as by racial minority, though it is doubtful that these two variables are empirically independent." *Ibid.*

(4) The Government also uses its baseless notion regarding some nonexistent correlation between race and criminal record in Bedau to criticize Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962), at U.S. Br. 3a. For Bedau's own discussion of the mutually supporting character of the New Jersey and Pennsylvania commutation studies, see 19 RUTGERS L. REV. at 19-21.

(5) The Government's quotation from BOWERS, EXECUTIONS IN AMERICA 74-75 (1974) regarding " 'obvious shortcomings in the body of research' " (U.S. Br. 7a) can be represented as something that Professor Bowers "concluded" (*ibid.*) only by capitalizing upon ambiguities in the verb "conclude." In fact, this passage describing prior research appears

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"These cases in which judge and jury have agreed on the penalty give, at first impression, a strong sense of unity. Among cases of premeditated

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at pp. 74-75 of the Bowers book as an *introduction* to Professor Bowers' own analysis of the race issue: the second sentence following the one quoted by the Government is: "The investigation reported in this chapter attempts to provide a broader historical and regional perspective on racial discrimination in capital punishment." BOWERS, *op. cit. supra* at 75. That investigation proceeds in *id.* at 75-102; and Professor Bowers' *conclusion* (titled by Bowers as such) is found in *id.* at 102-107, beginning with the paragraph:

> "The findings in the foregoing analysis point unmistakably to a pattern of racial discrimination in the administration of capital punishment in America – a pattern that appears to be deeply rooted in our society. It was most evident in that part of our society – the South – where a caste system has characterized relations between blacks and whites and produced what Myrdal (1944) terms 'An American Dilemma.' And it has persisted throughout the history of capital punishment under state authority, diminishing in some of its most obvious aspects in recent years only to reappear in subtler forms."

Id. at 102. Professor Bowers' additional *conclusions* that "[t]here is no evidence in these data . . . that the discrimination we uncovered has vanished in recent years," *id.* at 104, that "discrimination was no less pronounced under mandatory than under discretionary capital punishment," *ibid.*, and that "[t]hese data strongly suggest that the particular form of sentencing has little to do with the extent of racial discrimination that will be present in the administration of capital punishment," *ibid.*, also bear notice, particularly in connection with Professor Riedel's subsequent findings that the proportion of nonwhite defendants among all defendants committed to death row has not decreased, but has actually increased, under post-*Furman* death-sentencing procedures. Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMPLE L.Q. 261 (1976) (presently in galley proofs).

(6) On the other hand, the Government is quite right to point out that "one study relied upon by petitioners finds *no* evidence

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> killing they seem to stand out as especially vicious. The trouble is that some aspects of this viciousness verge so much on the clearly pathological that the criterion loses some of its usefulness.[27] Moreover, as we shall see, many of the murder cases in which the judge and jury disagree on the death penalty appear no less heinous than those in which they agree."

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of racial discrimination." U.S. Br. 1a, original emphasis. The article by Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941), says essentially what the Government says it says at U.S. Br. 1a-2a. It should not have been included among the articles collected in the Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at 136 n.226; its citation in that footnote was a mistake occasioned by confusion of the two Johnson articles therein; but such confusion is no excuse, and petitioners' counsel must apologize to the Court, the respondents, and *amici* for this error regarding the one Johnson article.

[27] *Cf.* Fla. Br. 34: "There is no evidence that Petitioner in this case was not 'normal.' Indeed, he merely has an uncontrollable urge to kill." *Compare* U.S. Br. 36 ("people who commit such crimes [as treason, espionage, sabotage, and deliberate wrecking of trains] are rational (albeit misguided or evil) individuals, and there is not reason to believe that they will not attend their own self-interest and consider the potential severity of the penalty that might be meted out"), *with* McWHINNEY, ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW 271 (1973) ("[w]hile some of the early hijackings from the United States to Cuba may have had a bona fide political motive, it soon became apparent – as extended psychological studies, in depth, of the perpetrators of abortive hijacking attempts after their apprehension, and of actual hijackers since returned from Cuba and taken into custody in the United States have shown – that for the most part these were emotionally disturbed or mentally unbalanced people with very little political or social awareness, and drawn mainly by the contagion of past example, and by the lure of the massive publicity given by the communication media . . ."). *See also* HUBBARD, THE SKY-JACKER (1971).

KALVEN & ZEISEL, *supra*, at 438-439. Conversely,

> "[t]he leniency categories [i.e., classes of cases in which either judge or jury would have spared the defendant] have a plausible ring. But the brute fact is that each time one of the factors listed was persuasive to one of the deciders, it was unpersuasive to the other. Either the judge or the jury was willing, despite the presence of the leniency-disposing factor, to have the defendant executed."

Id. at 444. The Government quotes Note, 21 STAN. L. REV. 1297, 1419 (1969), for the proposition that there are "definite patterns of jury decisionmaking, precluding the possibility that juries make their decisions wholly at random." U.S. Br. 96. But the Government ignores the points (1) that a component of this pattern is "significant economic bias," 21 STAN. L. REV. at 1367 – the tendency of juries to treat "a white-collar background . . . [as] a mitigating attribute all by itself since its association with life imprisonment cannot be explained by chance or any of the other 177 measurement variables," *ibid.*;[28] (2) that other aspects

[28] *Compare* Texas Judicial Council, "Capital Murder Study" (lodged with the Court by Respondent in No. 75-5394), at pp. 5-6:

> "The rate for conviction of capital murder of defendants represented by court appointed attorneys was 93% (39 convictions out of 42 cases), while the corresponding rate for those represented by retained counsel was 65% (20 convictions out of 31 cases.) Once convicted of capital murder, the defendants represented by court appointed attorneys received the death sentence in 79% of the cases (31 out of 39) while defendants represented by retained counsel received the death sentence in 55% of the cases (11 out of 20)."

Florida, to be sure, asserts that among cases of "58 [sic] persons sentenced to death, . . . in 39 of those, the defendant was represented by the public defender and 20 were represented by private practitioners." Fla. Br. 43. But, in our experience, "private practitioners" are also court-appointed to represent indigent capital defendants in Florida.

of the pattern are affected by anterior exercises of uncontrolled discretion by the prosecutor;[29] [30] and (3) that consideration of "178 measurement variables ranging from such aspects as the socio-economic background of the defendant to the defenses attempted at the trial," *id.* at 1317, failed to predict the outcome accurately in a significant number of cases, *id.* at 1324 n.90.

Also on the subject of jury dispositions, respondent Texas advises the Court that juries in 15 out of 60 cases of capital murder convictions chose to spare the defendant's life by answering "no" to the question whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society.[31] Tex. Br. 30. Is the point that these death-averting verdicts were as non-arbitrary as the "yes" answer to the same question returned by petitioner Jurek's jury upon evidence that he, too, had committed a capital murder and that four local citizens believed on hearsay grounds that his reputation in the

[29] *See* Cal. Br. 11: "The prosecutor . . . can take into account special facts and circumstances of the particular case not taken into account by rigid rules."

[30] *See, e.g.*, 21 STAN. L. REV. at 1326-1327: "[T]he admission of the defendant's 'priors' into evidence at penalty . . . is the best single predictor of the . . . penalty decisions . . . .

> ". . . But . . . the variable is something more than an overall measurement of the defendant's criminal history . . . . Apparently, the mere fact that some prosecutors chose to put priors in evidence at the penalty trial had an impact on the outcome of the cases. That is, not only the fact of the defendant's criminal history (or its absence) but also the manner in which the trial was conducted had an independently important influence on the penalty outcomes."

[31] Vernon's Tex. Code Crim. Pro. Ann., art. 37.071(b)(2) (1974), set forth in the Brief for Petitioner in *Jurek v. Texas*, No. 73-5394, at p. 8.

community was "bad"?[32] Or is the point that, as the Government argues, an arbitrary dispensation of mercy to some is not thereby an arbitrary infliction of death upon others to whom the dispensation is denied? U.S. Br. 80-82. Mercy, even arbitrary mercy, "sounds good: somebody escapes death. The trouble is that if you turn the coin around, somebody else *suffers* death because the jury did not . . . [choose to extend mercy to him]. And if the jury's *milder* verdict may be a function of its sympathies, then its *sterner* verdict, by inevitable logic, may be a function of its lack of sympathy."[33]

Or is the point ultimately that, as the Government argues, there are such "sound reasons, grounded in mercy and humane compassion, for desiring to hold to a minimum the number who must be executed" that "society could accomplish that aim by holding a lottery among all those convicted of first degree murder" (U.S. Br. 82 n.44) and gassing or electrocuting the losers consistently with the Constitution?

We respectfully suggest that each of these points mocks *Furman* and the Eighth Amendment. Talk about "holding [killings] to a minimum" from considerations of "mercy and humane compassion" is a euphemism used to sugar-coat the fact that the "minimum" few who get killed undergo a punishment which is too abhorrent for our society to tolerate with any generality. The "lottery" is a mechanism for killing them notwithstanding that abhorrence. The "explanation from mercy" (U.S. Br.81) soothes our conscience

[32] *See* note 26 *supra* at p. 15.

[33] BLACK: CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974) (original emphasis).

as conductors of the lottery.[34] It seeks to justify an arbitrary infliction of death. But if there is any purpose to a constitutional prohibition of cruel and unusual punishments, the penalty of death cannot be justified

[34] "How have we allowed ourselves to get here? I suggest it is because of our seeing the whole process through the medium of a radically false mythology. We tend, I believe, to think of persons' being 'clearly guilty' of crimes for which they ought to die. Then some of them, by acts of pure grace, are spared – by prosecutors' discretion, by jury leniency, by clemency . . . . (There is here perhaps a touch of Calvinism – but to a true Calvinist a blasphemous touch, for the 'grace' comes from humans all too human.)

"The trouble is that the system may just as well be viewed, and with enormously higher accuracy, if numbers count, must be viewed, as one in which a few people are selected, without adequately shown or structured reason for their being selected, to die. The inevitable corollary of sparing some people through mere grace or favor is standardless condemnation of others. The thing that ought to impress us is the standardless condemnation; we have been looking too long at its mirror image; we should take courage and turn around."

BLACK, *op. cit. supra* note 33, at 93.

by keeping its infliction to a tolerable "minimum" by arbitrary selectivity under the guise of "mercy."[35]

Respectfully submitted,

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[35] *See* Appendix 2 to the Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at pp. 2-27 to 2-42.

APPENDIX A

Statutes of American Jurisdictions Providing for Life Imprisonment or for Term Imprisonment of Fifty Years or More.

Unless noted parenthetically, the following statutes authorize either life imprisonment or an indeterminate term up to a maximum of life imprisonment:

Alabama

ALA. CODE ANN.

1. § 7 (1959): Kidnapping with intent of obtaining money or property for release of person kidnapped.
2. § 8 (1959): Attempted kidnapping.
3. § 23 (1959): Arson in the first degree when death results.
4. § 24 (1959): Arson in the second degree when death results.
5. § 85 (1959): Burglary in the first degree.
6. § 123 (1959): Exploding or setting off dynamite near inhabited dwelling, jail, or steam boat.
7. § 315 (1959): Killing in a duel.
8. § 316 (1959): Killing in sudden rencounter with concealed weapon.
9. § 395 (1959): Rape.
10. § 397 (1959): Carnal knowledge of woman or girl by administering drug.
11. § 398 (1959): Carnal knowledge of girl under twelve years of age.
12. § 415 (1959): Robbery.
13. § 416 (1959): Train robbery.
14. § 424 (1959): Treason.

Alaska

ALASKA STAT.

1. § 11.15.010 (1970): First degree murder.
2. § 11.15.020 (1970): Obstructing or injuring railroad or aircraft where death results.
3. § 11.15.030 (1970): Second degree murder.
4. § 11.15.130 (1975 cum. supp.): Rape of daughter, relative or person under 16.
5. § 11.15.260 (1970): Kidnapping.
6. § 11.15.270 (1970): Conspiracy to kidnap.

Arizona

ARIZ. REV. STAT. ANN.

1. § 13-248 (1956): Assault with intent to murder.
2. § 13-453(B) (1973 supp.): Second degree murder.
3. § 13-457(B) (1973 supp.): Manslaughter by armed person.
4. § 13-491 (1973 supp.): Kidnapping while armed.
5. § 13-521 (1973 supp.): Armed mayhem.
6. § 13-614 (1973 supp.): Rape.
7. § 13-643(B) (1975-1976 supp.): Armed robbery.
8. § 13-644 (1956): Boarding or interfering with train with intent to rob.
9. § 13-653 (1973 supp.): Child molestation.
10. § 13-671(C) (1975-76 supp.): Grand theft with a deadly weapon.
11. § 13-867 (1956): Poisoning with intent to kill.
12. § 13-881 (1956): Derailing or wrecking train.
13. § 13-922 (1973 supp.): Using explosives with intent to cause injury to persons or property (where physical injury to persons results).

Arkansas

ARK. STAT. ANN.

1. § 41-705 (1975): Criminal solicitation of capital murder or treason (50 year sentence).
2. § 41-714 (1975): Criminal conspiracy to commit capital murder or treason (50 year sentence).
3. § 41-1001 (1975): Extended term for habitual offender upon third felony conviction (50 year sentence).
4. § 41-1502 (1975): Murder in the first degree (50 year sentence).
5. § 41-1803 (1975): Rape (50 year sentence).
6. § 41-2102 (1975): Aggravated robbery (50 year sentence).
7. § 41-3158 (1975): Use of machine gun while perpetrating a crime of violence.

California

CAL. PENAL CODE

1. § 182 (1970): Conspiring to commit crime against specified public officials.
2. § 190 (1976 supp.): Second degree murder.
3. § 209 (1976 supp.): Kidnapping for ransom, extortion, robbery or resulting in bodily harm.
4. § 213(1) (1970): First degree robbery.
5. § 213(2) (1970): Second degree robbery.
6. § 216 (1970): Administering poison with intent to kill.
7. § 217.1 (1970): Attempting to kill or assault executive or judicial officers.
8. § 218 (1970): Attempted train wrecking.
9. § 219 (1976 supp.): Train wrecking where bodily harm results.

10. § 245(b) (1976 supp.): Assault with a deadly weapon upon a fireman or peace officer.

11. § 264 (1976 supp.): Rape (where great bodily injury to victim results).

12. § 264.1 (1970): Rape where defendants act in concert by force or violence.

13. § 285 (1970): Incest (50 year sentence).

14. § 286(d) (1976 supp.): Sodomy against will of victim when defendants act in concert by force or violence.

15. § 288 (1970): Committing lewd or lascivious acts upon child under fourteen.

16. § 288a(d) (1976 supp.): Oral copulation against victim's will where defendants act in concert by force or violence.

17. § 461 (1970): First degree burglary.

18. § 644(a) (1970): Third conviction of serious felony.

Colorado

COL. REV. STAT. ANN.

1. § 18-3-103 (1974): Second degree murder (50 year sentence).

2. § 18-3-301 (1974): First degree kidnapping (50 year sentence).

3. § 18-4-202 (1974): First degree burglary (50 year sentence).

4. § 18-6-102 (1974): Criminal abortion when patient dies (50 year sentence).

5. § 18-6-103 (1974): Pretended criminal abortion when patient dies (50 year sentence).

Connecticut

CONN. GEN. STAT. ANN.

1. § 53a-40 (1975): Persistent offenders committing class A felonies.

2. § 53a-92 (1975): Kidnapping in the first degree.

Delaware

DEL. CODE ANN., tit. 11

1. § 635 (1975): Second dgree murder.

2. § 763 (1975): Rape.

3. § 783 (1975): Kidnapping.

4. § 4205 (1975): Attempt to commit Class A felony.

District of Columbia

D.C. CODE ENCYCL. ANN.

1. § 22-201 (1967): Abortion, when death of mother results.

2. § 22-2101 (1967): Kidnapping.

3. § 22-2403 (1967): Murder in the second degree.

Florida

FLA. STAT. ANN.

1. § 779.07 (1975-1976 supp.): Intentional injury to or interference with ability of United States or a friendly power to make war or defend itself.

2. § 782.04(2), (3) (1975-1976 supp.): Second degree murder.

3. § 790.16 (1) (1975-1976 supp.): Throwing bombs or discharging machine gun resulting in great bodily harm or serious disruption of governmental operations.

4. § 790.161 (1975-1976 supp.): Throwing or discharging a destructive device resulting in the death of a person.

5. § 794.011(3) (1975-1976 supp.): Sexual battery where victim is over eleven and force or deadly weapon is used.

6. § 805.02 (1975-1976 supp.): Kidnapping for ransom.

7. § 810.01 (1975-1976 supp.): Burglary while armed with a dangerous weapon.

8. § 813.011 (1975-1976 supp.): Robbery.

Georgia

GA. CODE ANN.

1. § 26-2002 (1972): Aggravated sodomy.

2. § 26-2401 (1975 cum. supp.): Perjury resulting in execution.

Hawaii

HAWAII REV. STAT., tit. 371,

1. § 606 (1972): Murder.

2. § 720 (1972): Kidnapping.

3. § 730 (1972): Rape in the first degree.

4. § 733 (1972): Sodomy in the first degree.

5. § 840 (1972): Robbery in the first degree.

6. § 1241 (1972): Promoting a dangerous drug in the first degree.

Idaho

IDAHO CODE

1. § 18-4004 (1975 cum. supp.): Second degree murder.

2. § 18-4505 (1975 cum. supp.): First degree kidnapping.

3. § 18-6007 (1975 cum. supp.): Theft or interference with railroad car parts which causes death.

4. § 18-6011 (1975 cum. supp.): Obstruction or interference with railroad which causes death.

5. § 18-6104 (1975 cum. supp.): Rape.

6. § 18-6503 (1975 cum. supp.): Robbery.

7. § 19-2514 (1975 cum. supp.): Third conviction of felony.

Illinois

ILL. ANN. STAT., c.38,

1. § 10-2 (Smith-Hurd 1975-1976 supp.): Aggravated kidnapping.

2. § 11-1 (Smith-Hurd 1975-1976 supp.): Rape.

3. § 18-2 (Smith-Hurd 1975-1976 supp.): Armed robbery.

4. § 30-1 (Smith-Hurd 1975-1976 supp.): Treason.

5. § 33A-3 (Smith-Hurd 1975-1976 supp.): Second commission of armed violence.

Indiana

IND. ANN. STAT.

1. § 1-54-1 (Burns 1975): Murder in the second degree.

2. § 1-55-1 (Burns 1975): Kidnapping.

3. § 8-8-1 (Burns 1975): Third conviction for a felony.

4. § 13-4-1a (Burns 1975): Murder in the first degree.

5. § 13-4-3 (Burns 1975): Rape of child under twelve.

6. § 13-4-6 (Burns 1975): Robbery or attempt, during which physical injury inflicted.
7. § 13-5-1 (Burns 1975) Bank robbery.

Iowa

IOWA CODE ANN.
1. § 689.1 (1950): Treason.
2. § 690.2 (1975 cum. supp.): First degree murder.
3. § 690.3 (1950): Second degree murder.
4. § 697.1 (1975 cum. supp.): Death caused by high explosives.
5. § 698.1 (1950): Rape.
6. § 698.3 (1950): Carnal knowledge of imbecile.
7. § 706.3 (1975 cum. supp.): Kidnapping for ransom.
8. § 708.02 (1950): Aggravated burglary.
9. § 708.9 (1975 cum. supp.): Entering bank with intent to rob.
10. § 711.4 (1950): Train robbery.
11. § 721.1 (1950): Perjury in capital trial.

Kansas

KAN. STAT. ANN.
1. § 21-3402 (1974): Murder in the second degree.
2. § 21-3415 (1974): Aggravated battery against a law enforcement officer.
3. § 21-3420 (1974): Kidnapping.
4. § 21-3427 (1974): Aggravated robbery.
5. § 21-3504 (1974): Indecent liberties with a ward.
6. § 21-3506 (1974): Aggravated sodomy.
7. § 21-3719 (1974): Aggravated arson.

Kentucky

KY. REV. STAT. ANN.
1. § 507.020 (1975): Non-capital murder.
2. § 510.040 (1975): Rape in the first degree of a child under twelve.
3. § 510.070 (1975): Sodomy in the first degree of a child under twelve.
4. § 532.080 (1975): Persistent felony offenses.

Louisiana

LA. REV. STAT. ANN.
1. § 30.1 (1974): Second degree murder.
2. § 44 (1974): Aggravated kidnapping if victim is liberated unharmed.
3. § 64 (1974): Armed robbery (99 year sentence).
4. § 87.1 (1974): Killing a child during delivery.

Maine

ME. REV. STAT. ANN., tit. 17A
1. § 1251 (1975): Criminal homicide in the first and second degree.

Maryland

MD. ANN. CODE, Art. 27.
1. § 119 (1976): Dynamiting.
2. § 413 (1976): Aiding or abetting first degree murder.
3. § 461 (1976): Rape.
4. § 462 (1976): Carnal knowledge of child under 14 years or insane.
5. § 643 (1976): Fourth conviction of a crime of violence.

Massachusetts

MASS. GEN. LAWS ANN.

1. c. 264 § 2 (1968): Treason.
2. c. 265 § 2 (1968): Second degree murder.
3. c. 265 § 13 (cum. supp. 1974): Specified types of manslaughter.
4. c. 265 § 17 (1968): Armed robbery.
5. c. 265 § 18A (1968): Armed assaults in dwelling house.
6. c. 265 § 19 (1968): Unarmed robbery.
7. c. 265 § 21 (cum. supp. 1974): Confining or putting in fear a person for the purpose of stealing.
8. c. 265 § 22 (cum. supp. 1974): Rape.
9. c. 265 § 22A (cum. supp. 1974): Rape of a child under sixteen.
10. c. 265 § 23 (cum. supp. 1974): Rape of child.
11. c. 265 § 24 (cum. supp. 1974): Assault with intent to commit rape.
12. c. 265 § 24(b) (cum. supp. 1974): Assault with intent to commit rape upon a child under sixteen.
13. c. 265 § 26 (cum. supp. 1974): Kidnapping for gain.
14. c. 265 § 28 (1968): Poisoning food, medicine, spring.
15. c. 266 § 14 (1968): Armed burglary or burglary involving assault.
16. c. 266 § 42 (1968): Larceny of paper designed for bank bills.
17. c. 266 § 43 (1968): Printer retaining such paper with intent to counterfeit.
18. c. 266 § 50 (1968): Fraud or embezzlement by employee in the treasury.

Michigan

MICH. STAT. ANN.

1. § 750.80 (1968): Setting fire to mines.
2. § 750.83 (1968): Assault with intent to commit murder.
3. § 750.85 (1968): Assault with intent to commit rape, sodomy or gross indecency by sexual delinquent.
4. § 750.89 (1968): Assault with intent to rob and steal, being armed.
5. § 750.90 (1968): Attempt to murder.
6. § 750.158 (1968): Sodomy committed by sexual delinquent.
7. § 750.207 (1968): Placing explosives with intent to destroy, causing injury to any person.
8. § 750.316 (cum. supp. 1975): First degree murder.
9. § 750.317 (1968): Second degree murder.
10. § 750.319 (1968): Killing in a duel.
11. § 750.327 (1968): Causing death due to explosives.
12. § 750.328 (1968): Causing death due to explosives placed with intent to injure property.
13. § 750.333 (1968): Incest by sexually delinquent persons.
14. § 750.335a (1968): Indecent exposure by sexual delinquent.
15. § 750.338 (1968): Gross indecency by sexually delinquent persons.
16. § 750.349 (1968): Kidnapping.
17. § 750.422 (1968): Perjury during trial for capital offense.
18. § 750.436 (1968): Poisoning food, drink, medicines, wells.

19. § 750.511 (1968): Attempt to wreck railroad trains or endanger safety of passengers.

20. § 750.516 (1968): Forcible detention of railroad train for purpose of robbery.

21. § 750.517 (1968): Entering train for robbing.

22. § 750.531 (1968): Bank, safe and vault robbery.

23. § 750.544 (1968): Treason.

24. § 750.545(a) (1968): Subversion against state.

25. § 752.312 (1968): Overthrow of Government.

26. § 752.326 (1968): Sabotage when loss of life occurs.

Minnesota

MINN. CODE ANN.

1. § 609.185 (1964): Murder in the first degree.

2. § 609.385 (1964): Treason.

Mississippi

MISS. CODE ANN.

1. § 97-3-53 (cum. supp. 1974): Kidnapping.

2. § 97-3-63 (1973): Poisoning with intent to kill.

3. § 97-3-65 (cum. supp. 1974): Rape of victim over twelve.

4. § 97-3-71 (1973): Assault with intent to forcibly ravish.

5. § 97-3-79 (cum. supp. 1974): Armed robbery.

6. § 97-9-61 (1973): Perjury on trial of capital offense or felony.

7. § 97-37-25 (1973): Bombing with intent to harm person or property.

Missouri

MO. ANN. STAT.

1. § 557.020 (1976 Vernon's supp.): Perjury in a capital case.

2. § 556.140 (1953): Fourth felony while armed.

3. § 557.230 (1953): Rescuing prisoner convicted of capital crime.

4. § 559.009(3) (1976 Vernon's supp.): First degree murder.

5. § 559.009(3) (1976 Vernon's supp.): Second degree murder.

6. § 559.150 (1976 Vernon's supp.): Poisoning with intent to kill or injure.

7. § 559.180 (1953): Assault with intent to kill.

8. § 559.230 (1976 Vernon's supp.): Kidnapping for ransom.

9. § 559.260 (1976 Vernon's supp.): Rape.

10. § 559.270 (1953): Rape effected by use of drugs.

11. § 559.280 (1953): Forcing a woman to marry.

12. § 560.135 (1976 Vernon's supp.): Armed robbery in the first degree.

13. § 560.010 (1953): Arson.

14. § 564.560 (1976 Vernon's supp.): Bombing.

Montana

MONT. CRIM. CODE (1973)

1. §§ 94-5-102, 94-5-105 (1974 supp.): Deliberate homicide (one hundred year sentence).

2. § 94-5-303 (1974 supp.): Aggravated kidnapping (one hundred year sentence).

Nebraska

NEB. REV. STAT.

1. § 28-101 (1964): Treason.
2. § 28-402 (1964): Murder in the second degree.
3. § 28-415 (1964): Train robbery.
4. § 28-417 (1964): Kidnapping.
5. § 28-537 (1964): Burglary with explosives.
6. § 28-579 (1964): Interference with railroad property resulting in death.
7. § 28-811 (1964): Dueling which results in a death.
8. § 28-906 (1964): Incest.

Nevada

NEV. REV. STAT.

1. § 196.010 (1973): Treason.
2. § 200.030 (1975 supp.): Second degree murder.
3. § 200.302 (1975 supp.): First degree kidnapping.
4. § 200.400 (1975 supp.): Assault or battery with intent to commit a crime.
5. § 200.363 (1975 supp.): Forcible rape.
6. § 200.410 (1975 supp.): Dueling which results in death.
7. § 200.190 (1973): Crime against nature.
8. § 202.270 (1975 supp.): Destruction of building by explosives.
9. § 207.010 (1973): Third felony conviction.

New Hampshire

N.H. REV. STAT. ANN.

1. §§ 630:1-b, 651:2(II)(d) (1974): Second degree murder.
2. § 630:1-a(III) (1974): First degree murder.

New Jersey

N.J. STAT. ANN.,

1. tit. 2A, § 85-12 (1969): Fourth felony conviction.
2. tit. 2A, § 113-4 (1969): First degree murder.
3. tit. 2A, § 118-1 (1969): Kidnapping for ransom.
4. tit. 2A, § 148-6 (1969): Assaulting high executive officers with intent to kill or to show opposition to all government.
5. tit. 2A, § 151-5 (1969): Committing fourth felony while armed with deadly weapon.

New Mexico

N.M. STAT. ANN.

1. § 40A-4-1 (1975 cum. supp.): Kidnapping.
2. § 40A-9-21 (1975 cum. supp.): Criminal sexual penetration in the first degree.
3. § 40A-16-2 (1975 cum. supp.): Second armed robbery conviction.
4. § 40A-22-7 (1972): Unlawful rescue of prisoner convicted of capital felony.

New York

N.Y. PENAL LAW

1. § 220.16 (1974-75 supp.): Criminal possession of a controlled substance in the third degree.
2. § 220.18 (1974-75 supp.): Criminal possession of a controlled substance in the second degree.
3. § 220.21 (1974-75 supp.): Criminal possession of a controlled substance in the first degree.
4. § 220.39 (1974-75 supp.): Criminal sale of a controlled substance in the third degree.

5. § 220.41 (1974-75 supp.): Criminal sale of a controlled substance in the second degree.

6. § 220.43 (1974-75 supp.): Criminal sale of a controlled substance in the first degree.

7. § § 110.05(1), 125.27 (1975): Attempted first degree murder.

8. § 125.25 (1975): Second degree murder.

9. § 150.20 (1975): First degree arson.

10. § 135.25 (1975): First degree kidnapping.

North Carolina

N.C. GEN. STAT.

1. § 14-7-6 (1969): Habitual felons.

2. § 14-17 (1975 supp.): Murder in the second degree.

3. § 14-20 (1969): Dueling in which death occurs.

4. § 14-21 (1975 supp.): Rape in the second degree.

5. § 14-28 (1969): Malicious castration (60 year sentence.)

6. § 14-29 (1969): Malicious maiming (60 year sentence.)

7. § 14-39 (1975 supp.): Kidnapping where victim is harmed.

8. § 14-49.1 (1969): Malicious damage of occupied property by use of explosive.

9. § 14-52 (1975 supp.): First and second degree burglary.

10. § 14-58 (1975 supp.): Arson.

North Dakota

N. DAK. CODE

1. § 12.1-32-09 (1975 special supp.): Dangerous special offender.

Ohio

OHIO REV. CODE

1. § § 2903.02, 2929.02(b) (1975): Murder.

2. § 2907.02(B) (1975): Forcible rape of child under thirteen.

Oklahoma

OKLA. STAT. ANN.

1. tit. 21, § 51 (1975 supp.): Felony recidivism.

2. tit. 21, § 52 (1958): Larceny recidivism.

3. tit. 21, § 521 (1958): Rescuing prisoner.

4. tit. 21, § 651 (1958): Attempt to kill by administering poison.

5. tit. 21, § 701.4 (1975 supp.): Second degree murder.

6. tit. 21, § 715 (1958): First degree manslaughter.

7. tit. 21, § 745 (1958): Accessory to kidnapping for extortion.

8. tit. 21, § 798 (1958): First degree robbery or attempted armed robbery.

9. tit. 21, § 801 (1975 supp.): Armed robbery or attempted armed robbery.

10. tit. 21, § 1266 (1958): Advocating overthrow of government by force.

Oregon

ORE. REV. STAT.

1. § 163.010 (1973): First degree murder.

2. § 166.005 (1973): Treason.

3. § 166.230 (1973): Commission of fourth armed felony.

4. § 163.620 (1973): Kidnapping for ransom.

5. § 163.630 (1973): Conspiracy to kidnap for ransom.

6. § 163.220 (1973): Rape of sister, daughter or wife's daughter.

Pennsylvania

PA. STAT. ANN.

1. tit. 18, § 2704 (1975): Assault by life prisoner.

Rhode Island

R.I. GEN. LAWS ANN.

1. § 11-4-1 (1974 supp.): Arson.
2. § 11-5-4 (1970): Assault with a dangerous weapon in a dwelling house.
3. § 11-8-1 (1970): Burglary.
4. § 11-23-2 (1974 supp.): First and second degree murder.
5. § 11-26-2 (1970): Kidnapping with intent to extort.
6. § 11-37-1 (1970): Common law rape.
7. § 11-39-1 (1970): Robbery.
8. § 11-43-1 (1970): Treason.
9. § 11-47-3 (1970): Carrying arms when committing a crime of violence.

South Carolina

S.C. CODE

1. § 16-63 (1962): Killing in a duel.
2. § 16-91 (1975 cum supp.): Kidnapping.
3. § 16-92 (1962): Conspiring to kidnap.
4. § 16-331 (1962): Burglary.

5. § 16-336 (1962): Entering bank with intent to steal.
6. § 16-337 (1962): Safecracking.
7. § 17-553.1 (1962): Fourth felony.

South Dakota

S.D. COMPILED LAWS ANN. 1967

1. § 22-7-1 (1969): Fourth felony.
2. § 22-8-3 (1969): Treason.
3. § 22-8-11 (1969): Insurrection.
4. § 22-16-10 (1969): Killing in a duel.
5. § 22-16-11 (1969): Killing resulting from conspiring to acquire a mine unlawfully.
6. § 22-16-13 (1969): First degree murder.
7. § 22-16-18 (1975 supp.): Death resulting from unlawful abortion.
8. § 22-16-19 (1969): Manslaughter in first degree.
9. § 22-16-37 (1975 supp.): Aiding and abetting suicide.
10. § 22-18-22 (1969): Administering poison with intent to kill.
11. § 22-19-1 (1969): Kidnapping.
12. § 22-19-2 (1969): Conspiring to kidnap.
13. § 22-22-8 (1969): Death of child resulting from indecent molestation.
14. § 22-22-11 (1969): Compelling a woman to marry.
15. § 22-22-20 (1969): Incest with child under ten or a mental defective.
16. § 22-30-9 (1969): Bank robbery.
17. § 22-30-10 (1969): Entering into bank with intent to commit felony.
18. § 22-32-2 (1969): First degree burglary.
19. § 22-39-3 (1969): First degree forgery.

Tennessee

TENN. CODE ANN.

1. § 39-606 (1975 repl. vol.): Assault with intent to carnally know or sexually molest child under twelve.
2. § 39-614 (1975 repl. vol.): Assault from ambush.
3. § 39-2407 (1975 repl. vol.): Accessory before the fact to first degree murder.
4. § 39-2408 (1975 repl. vol.): Second degree murder.
5. § 39-2603 (1975 repl. vol.): Kidnapping for ransom.
6. § 39-2604 (1975 repl. vol.): False representation as kidnapper to collect ransom.
7. § 39-3606 (1975 repl. vol.): Obstruction of railroad tracks resulting in death.
8. § 39-3702 (1975 repl. vol.): Rape of female over twelve.
9. § 39-3704 (1975 repl. vol.): Carnal knowledge by administering drugs.
10. § 39-3705 (1975 repl. vol.): Carnal knowledge of a child under twelve years.
11. § 39-3707 (1975 repl. vol.): Aiding and abetting rape.
12. § 39-3901 (1975 repl. vol.): Armed robbery.

Texas

TEX. PENAL CODE ANN.

1. § 12-42(c): Felony recidivism.
2. § 19.02 (1974): First degree murder.
3. § 20.04 (1974): Aggravated kidnapping.
4. § 21.03 (1974): Aggravated rape.
5. § 21.05 (1974): Aggravated sexual abuse.

6. § 22.03 (1974): Deadly assault on a peace officer.
7. § 28.02 (1974): Arson which causes death.
8. § 29.03 (1974): Aggravated robbery.
9. § 30.02 (1974): First degree burglary.

Utah

UTAH CODE ANN.

1. § 76-5-203 (cum. supp. 1976): Second degree murder.
2. § 76-5-302 (cum. supp. 1976): Aggravated kidnapping where victim released unharmed.
3. § 76-5-405 (cum. supp. 1976): Aggravated sexual assualt.
4. § 76-5-203 (cum. supp. 1976): Aggravated burglary.
5. § 76-6-302 (cum. supp. 1976): Aggravated robbery.
6. § 76-8-1001 (cum. supp. 1976): Felony recidivism.

Vermont

VT. STAT. ANN. tit. 13

1. § 11 (1974): Felony recidivism.
2. § 501 (1974): Arson causing death.
3. § 1203 (1974): Burglary of sleeping apartments at night.
4. § 2303 (1974): First and second degree murder.
5. § 2701 (1974): Maiming.

Virginia

VA. CODE ANN.

1. § 18.2-32 (1975): First degree murder.
2. § 18.2-40 (1975): Lynching.

3. § 18.2-48 (1975): Abduction with intent to extort money or for immoral purposes.

4. § 18.2-58 (1975): Armed robbery.

5. § 18.2-61 (1975): Rape of female thirteen or older; carnal knowledge of female thirteen or younger.

6. § 18.2-77 (1975): Burning or destroying inhabited building.

7. § 18.2-89 (1975): Burglary with a deadly weapon.

8. § 18.2-90 (1975): Entering dwelling with intent to commit murder, robbery, or rape while armed.

9. § 18.2-91 (1975): Entering dwelling with intent to commit larceny or other felony while armed.

10. § 18.2-92 (1975): Breaking and entering dwelling house with intent to commit assault or other misdemeanor while armed.

11. § 18.2-93 (1975): Entering bank with intent to commit larceny.

12. § 18.2-153 (1975): Malicious obstruction or injuring of canal, railroad or power line resulting in death.

13. § 18.2-154 (1975): Malicious shooting or throwing missiles at train, car, or boat resulting in death.

14. § 18.2-155 (1975): Destroying or damaging railroad signal resulting in death.

15. § 18.2-255 (1975): Illegal distribution of certain drugs to persons under eighteen (fifty year sentence).

16. § 18.2-279 (1975): Malicious discharge of firearms or missiles within or at occupied building resulting in death.

17. § 18.2-289 (1975): Possession or use of machine gun in perpetration or attempted perpetration of crime of violence.

18. § 18.2-300 (1975): Possession or use of sawed-off shotgun in perpetration or attempted perpetration of crime of violence.

19. § 18.2-481 (1975): Treason.

Washington

WASH. REV. CODE ANN.

1. § 9.09.010 (1975 supp.): First degree arson.

2. § 9.11.010 (1961): First degree assault.

3. § 9.19.010 (1961): First degree burglary.

4. § 9.41.025 (1975 supp.): Committing crime when armed.

5. § 9.48.040 (1961): Murder in the second degree.

6. § 9.48.050 (1961): Killing in a duel.

7. § 9.52.010 (1961): Second degree kidnapping.

8. § 9.75.010 (1961): Robbery.

9. § 9.75.020 (1961): Interfering with railroad with intent to commit robbery.

10. § 9.79.010 (1975 supp.): Rape.

11. § 9.79.020 (1975 supp.): Carnal knowledge of child under ten.

12. § 9.79.090 (1975 supp.): Incest.

13. § 9.92.090 (1961): Felony and misdemeanor recidivism.

West Virginia

W. VA. CODE

1. § 61-1-2 (1966): Treason.

2. § 61-2-2 (1966): First degree murder.

3. § 61-2-12 (1966): Armed robbery.

4. § 61-2-14a (1966): Kidnapping for ransom.

5. § 61-2-14c (1966): Threatening to kidnap for ransom.

6. § 61-2-15 (1966): Rape.
7. § 61-2-18 (1966): Killing in duel.
8. § 61-3-28 (1966): Obstruction or injury to railroad or canal.
9. § 61-3-41 (1966): Wilful injury to railroad property causing death.
10. § 61-6-12 (1966): Participating in a lynching.

Wisconsin

WIS. STAT. ANN.
1. § 940.01 (1958): First degree murder.
2. § 940.31 (1958): Kidnapping.
3. § 946.01 (1958): Treason.

Wyoming

WYO. STAT. ANN.
1. § 6-9 (cum. supp. 1975): Conviction of third felony (50 year sentence).
2. § 6-54(iv) (cum. supp. 1975): Murder committed by one previously convicted of first or second degree murder.
3. § 6-54(v) (cum. supp. 1975): Murder committed by prisoner under a life sentence.
4. § 6-57 (1959): Murder by duel.
5. § 6-61 (1959): Child stealing or harboring.
6. § 6-63 (cum. supp. 1975): First degree rape.

United States

18 U.S.C.A.
1. § 794 (1969): Gathering of or delivering defense information to aid foreign government.

2. § 837 (1969): Illegal use and possession of explosives causing death.
3. § 1111 (1966): First and second degree murder within the special maritime and territorial jurisdiction of the United States.
4. § 1114 (1975 supp.): First and second degree murder of officers or employees of the United States.
5. § 1116 (1975 supp.): First and second degree murder of foreign officials or official guests.
6. § 1117 (1975 supp.): Conspiracy to commit murder.
7. § 1153 (1975 supp.): First and second degree murder or rape in Indian Country by any Indian.
8. § 1201 (1975 supp.): Kidnapping.
9. § 1716 (1975 supp.): Causing death by mailing injurious articles.
10. § 1751 (1970): Assassination or kidnapping of President or Vice President.
11. § 1992 (1970): Train wrecking leading to death.
12. § 2031 (1970): Rape within the special maritime and territorial jurisdiction of the United States.
13. § 2113(e) (1970): Killing or kidnapping during bankrobbery.
14. § 2381 (1970): Treason.

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